IN THE

Supreme Court of the United States

October Term, 1978
No. 78636

DUANE FAGNAN,

Petitioner,

vs.

GREAT CENTRAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Great Central Insurance Company opposes the request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals and respectfully requests that the petition herein be denied.

JURISDICTION

Respondent does not dispute Petitioner's jurisdictional statement.

QUESTION PRESENTED

Does a party's right to name a liability insurance company as a defendant in a suit for damages under a state's direct action statute require the conclusion that the insurance company can be held liable to that party even though the party's claim against the insured would be barred because of a defense such as that embodied in the compulsory counterclaim rule?

STATEMENT OF THE CASE

Respondent is in substantial agreement with petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I. CIRCUIT COURT'S OPINION IS CLEAR AND IS BASED ON SUBSTANTIAL AND SOUND JUDICIAL PRECEDENT.

Great Central insured Darrold Thompson with respect to liability for damages caused by him and members of his household in connection with automobile accidents. When a lawsuit was brought in Federal Court against the estate of Robert Thompson, Darrold's son, alleging negligence on Robert's part in causing an automobile accident on May 16, 1975, Great Central Insurance Company retained counsel and defended the estate under the terms of the policy issued to Darrold Thompson. In that action, the driver of the second car, Duane Fagnan, was ultimately joined as a party defendant.

The Minnesota litigation was reduced to judgment pursuant to stipulation of all the parties. This occurred without Fagnan at any time asserting a claim for his personal injuries against the estate of Robert Thompson.

In the matter now before the Court, Fagnan sought to avoid the obvious compulsory counterclaim defense available to the estate by suing only the owner of the car and his insurer, Great Central. The owner of the vehicle was awarded a directed verdict at the close of all of the evidence. Great Central's argument to the Trial Court that it was entitled to dismissal for the same reasons that judgment of dismissal would have been required had the estate been sued was rejected.

On Great Central's appeal, the Circuit Court of Appeals reversed and held that under Wisconsin's Direct Action Statute an injured party has neither a better nor a worse claim against an insurer then he has against its insured. The Court's ruling is clear and concise. It follows from a common sense reading of Rule 13(a), W.S.A. 204.30(4) and W.S.A. 803.04 (2)(a). What is more, the ruling is consistent with and not contrary in any way to the host of federal decisions that have been handed down concerning the scope and effect of the Rule 13(a) bar.

That there is no significant controversy concerning the issue resolved by the lower court and as to which petitioner now seeks review is demonstrated by the petitioner's conspicuous failure to direct this Court's attention to any other decisions by courts of appeals which are in conflict with the position taken by the lower court in the instant case.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE STATE OF WISCONSIN.

The Court of Appeals correctly interpreted *Nicols v. U.S.F. & Guaranty Co.*, 13 Wis.2d 491, 109 N.W.2d 131 (1961) and *Hunt v. Dollar*, 224 Wis. 48, 271 N.W. 405 (1937) when it concluded that Wisconsin's direct action statute does not create liability against the insurer if, at the outset, its insured is not potentially liable.

If the language from the *Nichols* decision which is quoted in the opinion of the Court of Appeals[1] does not conclusively establish the point for which Great Central has contended throughout these proceedings, then surely this further statement of the Wisconsin Supreme Court in *Hunt* should lay any further dispute to rest:

> "Appellant contends that Section 85.93, Stats., makes an insurer of an owner of an automobile liable to a person injured regardless of the liability of the insured under the policy and cites *Oertel v. Williams* * * * in support of the contention. We can perceive no such effect either of the statute or of the decision cited . . . There is nothing [in the statute] to negative the idea that the insurer is not liable unless the insured is . . . As to the statute, it does not create liability against the insurer. Liability against the insurer, if any exists, is created by the insurance contract, not by the statute." *Hunt*, supra, 224 Wis. at 53, 271 N.W. at 409.

[1] Please note the typographical error appearing at page 136 of the the lower Court's opinion. The quote from the *Nichols* opinion should read as follows:

> "[t]he fact that a third party can sue an insurer of a motor vehicle direct . . . without first recovering a judgment against the insured defendant does not enlarge the coverage afforded by such policy or determine the insurer's liability thereunder. The third party can only recover from the insurer by virtue of the contract existing between it and its insured.

Indeed, the case now relied upon by petitioner, *Kujawa v. American Indemnity Co.*, 245 Wis. 361, 14 N.W.2d 31, 151 A.L.R. 1133 (1944) is not support for his position at all for it cites both *Nichols* and another case on the point, *Weichmann v. Haber*, 211 Wis. 333, 248 N.W. 112 (1933) with approval. In *Weichmann* the Wisconsin Supreme Court held that the abatement of a cause of action for wrongful death by the death of the defendant insured under an automobile policy also abated the cause of action against the insurer. The Court concluded that neither the statute nor the case law indicated an intention to create liability as to an insurer completely disassociated from any liability on the part of an insured.

Petitioner has referred to this Court's decision in *Lumberman's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 99 L.Ed. 59, 75 S. Ct. 151 (1954). *Elbert* raises a question of federal jurisdiction under Louisiana law and deals with Louisiana's direct action statute. Since the decisional law under the statute and the statute itself vary significantly from Wisconsin law, the *Elbert* decision provides no support to petitioner in the case at bar.

In short, under Wisconsin law, a defense available to the insured is also available to the insurer.

Petitioner also argues that at the time that his action was commenced, neither state nor federal law precluded him from prosecuting his claim against the administrator of Robert Thompson's estate. This argument is manifestly incorrect. Rule 13(a) certainly precluded any such claim being prosecuted in federal court and even in state court, the Rule 13(a) bar would have precluded the prosecution of such a claim. See *London v. City of Philadelphia*, 412 Pa. 496, 194 A.2d 910

(1963); *Horn v. Woolever*, 170 Oh. 178, 163 N.E.2d 378, cert. denied 80 S. Ct. 861, 362 U.S. 951, 4 L.Ed.2d 868 (1959); *Meachan v. Halley*, 38 Tenn. App. 20, 270 S.W.2d 503 (1954); and *Jocie Motor Lines, Inc. v. Johnson*, 231 N.C. 367, 57 S.E.2d 388 (1950). In addition to the authority provided by this case law, we direct the Court's attention to 6 Wright and Miller, *Federal Practice and Procedure* § 1417 at b.102

> ". . . State Courts have generally adopted the approach of treating the barring effect of the rule as substantive and have declined to hear any claim not pleaded in a prior Federal action as required by Rule 13(a)."

III. THERE HAS BEEN NO ABRIDGMENT OF A SUBSTANTIVE RIGHT CREATED BY STATE STATUTE.

Petitioner's claim that his substantive right under Wisconsin's direct action statute has been wrongfully abridged is without merit. A moment's reflection discloses the error in the argument. If the argument were correct, then we are left with the conclusion that if there had been a jury verdict in the Minnesota action finding Robert Thompson free of any negligence and finding Duane Fagnan one hundred percent at fault, this verdict would not have been binding upon Fagnan in his subsequent suit against Robert Thompson's insurer in Wisconsin. This is not the law.

While it is true that application of the Rule 13(a) bar in this case results in Duane Fagnan not having a right of recovery over against Great Central in the second suit, an "outcome determination" analysis as to the permissible scope for the application of a federal rule of civil procedure has never been the proper talisman. *Hanna v. Plumer*, 380 U.S. 460, 80 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

The very laudable purpose of Rule 13(a) is to avoid multiplicity of suits and circuitry of action. *Southern Construction Company, Inc. v. Pickard*, 371 U.S. 57, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962). As was stated in *Hanna*, supra:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over Federal Procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S. at 473, 474, 85 S.Ct. at 1145, 14 L.Ed.2d at 22.

CONCLUSION

According to Rule 19, Supreme Court Rules, a petition for issuance of a Writ of Certiorari is to be granted only where there are special and important reasons therefore. These may include the need to resolve a conflict in decisions amongst two or more Courts of Appeals, the importance in correcting a decision of a Court of Appeal which is in conflict with applicable decisions of this Court, and to review a decision regarding an important question of Federal law which has not previously been settled by this Court.

Given the parameters established by Rule 19, this is clearly not a case warranting the issuance of a Writ of Certiorari and the petition herein should be denied.

Dated:

Respectfully submitted,

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